

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP296-CR

Cir. Ct. No. 2013CF284

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESSE G. DONNELLY,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Marathon County:
JILL N. FALSTAD, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jesse Donnelly appeals a judgment sentencing him to five years' initial confinement and five years' extended supervision for child enticement—sexual contact. He contends the author of the presentence

investigation report (PSI) was biased against him and he was sentenced on the basis of false information. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 The complaint charged Donnelly with first-degree sexual assault of a child, second-degree sexual assault of a child, incest, two counts of exposing his genitals to the child, and intimidation of the victim. According to the complaint and the police reports, a ten-year-old child reported Donnelly showered with her, touched her genital area, and made her touch his genitals. After they left the shower, they went to the living room wearing towels and lay on a “couch-type thing that was turned into a bed.” Donnelly removed his towel and told the child to remove hers, and they both covered up with a blanket. Donnelly called the child his “little heater” at that time. The next day, Donnelly instructed the child to take another shower with him. He took her clothes off and pulled her into the bathtub. After she washed herself “down there,” Donnelly washed her again. On both occasions, Donnelly instructed the child not to tell anyone.

¶3 Pursuant to a plea agreement, the State amended the first-degree sexual assault charge to one count of child enticement. It dismissed the charges of second-degree sexual assault and incest, and dismissed and read in for sentencing purposes the two counts of exposing genitals and the victim intimidation count. Donnelly entered a no-contest plea to the enticement charge.

¶4 The PSI author, Derek Durante, stated Donnelly refused to take responsibility for his actions, blamed the child for making up lies and did not understand the magnitude of his behavior. Although Donnelly entered a no-contest plea to the enticement charge, he denied all sexual contact with the child

and claimed he accompanied her to the bathroom at her insistence because she was afraid, and he only washed her hair.

¶5 After the PSI was completed, Donnelly filed a motion for an evidentiary hearing, alleging bias by the PSI author and alleging twenty-seven errors in the PSI. At the hearing, Donnelly gave his version of the PSI interview and identified alleged inaccuracies and omissions in the PSI. Durante testified to his recollection of the interview and confirmed that he did not include every statement Donnelly made in the PSI, and did not recall some of the statements Donnelly testified he made during the interview. Durante clarified several of the terms he used in the PSI that Donnelly contended were mischaracterizations of the facts. The circuit court found Durante performed his duties in a neutral and independent manner and provided a PSI that contained accurate material and factual information. The court denied Donnelly's request for a new PSI.

¶6 Donnelly then procured an alternative PSI prepared by Barry Hargan. Hargan's PSI included a psychosexual evaluation from Dr. Nicholas Yackovich, a psychologist who conducts sexual risk assessments. Hargan testified at the sentencing hearing that two sexual risk assessment instruments and one psychopathology assessment instrument, as well as dynamic factors considered by Yackovich, showed Donnelly had the ability to manage his sexual impulses, would be amenable to supervision in the community and would be a low risk to re-offend. When asked whether it was relevant why the person offended, Hargan responded, "It's not relevant to me in terms of trying to ascertain the potential for this individual to re-offend when they get out." Hargan testified people who are accused or convicted of sexual offenses who are "in denial" can be treated and "people oftentimes have an opportunity to change from the beginning point to the end point of treatment, depending on circumstances." He conceded it is difficult,

if not impossible, to assess whether an individual would re-offend if one does not know why they offended in the first place.

¶7 The circuit court found Donnelly's failure to accept responsibility an aggravating factor. The court rejected Donnelly's contention that, by his no-contest plea, he was accepting responsibility. The court expressed concern about Donnelly's amenability to treatment in light of his denials of sexual contact with the child. The court faulted Donnelly for blaming others, particularly the victim and her mother, who Donnelly accused of orchestrating the false allegations. The court found the child's accusations recited in the police reports to be more credible than Donnelly's denials. The court imposed a sentence of ten years' imprisonment, fifteen years less than the maximum sentence.

DISCUSSION

¶8 Donnelly does not allege actual bias that would disqualify Durante from preparing the PSI. Rather, he argues implied bias based on alleged errors in the PSI, Durante's acceptance of the victim's allegations, and Durante's recommendations.

¶9 A defendant has a due process right to a fair sentencing hearing. *See State v. Suchocki*, 208 Wis. 2d 509, 516, 561 N.W.2d 332 (Ct. App. 1997) *abrogated on other grounds by State v. Tiepelman*, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1. The integrity of the sentencing process demands that the PSI be accurate, reliable and objective. *Suchocki*, 208 Wis. 2d at 518. The author of the report must be neutral and independent from either the prosecution or defense. *Id.* To obtain relief based on implied bias by the PSI author, a defendant must demonstrate that the sentencing court actually relied on the biased PSI. *Id.* at 516. Whether Donnelly's due process rights were violated by presentation of a biased

PSI is a question of law that we decide without deference to the circuit court's decision. *Id.* at 514-15.

¶10 On appeal, Donnelly identifies ten alleged errors or omissions in the PSI that he contends establish Durante's bias. First, he contends Durante fundamentally misunderstood the charge, believing Donnelly was to be sentenced for a sexual assault. However, the PSI properly reflects the charges on which Donnelly was to be sentenced. Durante testified that he believed the enticement conviction was sexually oriented and that as a person who supervised sex offenders, Durante would not draw a distinction between child enticement and sexual assault for purposes of punishment, supervision and rehabilitation. The record does not show that Durante mistakenly believed Donnelly was being sentenced for the crime of sexual assault of the child.

¶11 Second, Donnelly contends Durante falsely accused him of failing to accept responsibility for his actions and stating that Donnelly rejected any supervision. However, Durante testified that he based his assessment of Donnelly's failure to accept responsibility on Donnelly's continued denial of all of the details of the incidents described by the victim. The law is clear that Durante was entitled to make discretionary determinations involving his impressions and subjective feelings regarding Donnelly's conduct in making his sentencing recommendation. *Suchocki*, 208 Wis. 2d at 518-19; *State v. Littrup*, 146 Wis. 2d 120, 133, 473 N.W.2d 164 (Ct. App. 1991) *abrogated on other grounds by Tiepelman*, 291 Wis. 2d 179, ¶2. Further, Donnelly's claim that Durante found him resistant to supervision is inaccurate as Durante acknowledged Donnelly requested probation, which would be a form of supervision.

¶12 Third, Donnelly faults Durante for claiming Donnelly's access to the victim would be an acute risk factor even though Durante testified he would likely prohibit access to the victim as a condition of probation. Durante had no way of knowing whether Donnelly would abide by conditions of probation.

¶13 Fourth, Donnelly faults Durante for failing to include details regarding Donnelly's contacts and efforts to have contact with his daughter from birth to age seven. Durante conceded he did not include in the PSI every statement Donnelly made during the interview. The record does not show the sentencing court relied in any manner on Durante's assertion that Donnelly "abandoned his daughter."

¶14 Fifth, Donnelly faults Durante for failing to include in the PSI details Donnelly provided about the enticement incident. He contends Durante stopped taking notes while Donnelly was describing the incident. He argues Durante's assertion that Donnelly was not forthcoming about the events is an indication of Durante's bias. An agent is entitled to give his or her assessments and impressions. *Littrup*, 146 Wis. 2d at 133. Donnelly's "details" about washing the child's hair essentially denied the crime to which he pled no contest. Durante was entitled to conclude Donnelly was not forthcoming about the incident and was attempting to minimize his guilt.

¶15 Sixth, Donnelly faults Durante for failing to include in the PSI three examples given by Donnelly that the child made up stories (that she was a vampire, her friend was a hedgehog, and at night a little fairy doll came to life). There is no reason these stories should have been included in the PSI. These fanciful stories do not undermine the child's detailed descriptions of the sexual assault incidents.

¶16 Seventh, Donnelly faults Durante for failing to include details about Donnelly's marital strife. However, to fulfill Donnelly's due process rights, Durante was required to include only "accurate and relevant information" that would assist the court at sentencing. *See State v. Melton*, 2013 WI 65, ¶ 26, 349 Wis. 2d 48, 834 N.W.2d 345 (citation omitted). Donnelly's marital strife was not relevant to the sentence for this offense.

¶17 Eighth, Donnelly contends the PSI creates confusion about the victim impact statement, specifically, whether it was written by the child or her mother. Durante clarified at the evidentiary hearing that the statement was written by the child's mother. Therefore, there was no confusion about that question at the time of sentencing.

¶18 Ninth, Donnelly faults Durante for failing to include in the PSI Donnelly's history of having to take control of the finances in his house. That question has no conceivable relevance to sentencing for this crime.

¶19 Tenth, Donnelly disputes Durante's assertion that Donnelly masturbated to photos of a nude woman. The record shows the court did not consider that allegation when imposing sentence. None of the ten alleged errors or omissions in the PSI show that Durante was biased or that the court relied upon a biased PSI.

¶20 Donnelly contends the notes taken by Durante during the interview are irrelevant. The circuit court found Durante's account of the PSI interview more credible than Donnelly's in part because Durante took notes. A circuit court decides the credibility of witnesses. *State v. Turner*, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983). It was entitled to consider Durante's note taking as a factor in determining whether he accurately described the PSI interview.

¶21 Donnelly also failed to establish the circuit court relied on any improper factor in imposing the sentence. The sentencing court stated its concern as to the likelihood of Donnelly re-offending because the court did not know why Donnelly committed this crime. Donnelly contends his motive for committing the crime is not a proper sentencing factor. We disagree. The sentencing court could reasonably relate Donnelly’s motive to the likelihood of re-offending. Donnelly contends the sentencing court’s failure to accept the “finding of fact” that Donnelly was a low risk to re-offend is clearly erroneous. The court is not required to accept an expert’s assessment. *State v. Randall*, 2011 WI App 102, ¶30, 336 Wis. 2d 399, 802 N.W.2d 194. The actuarial instruments used in the alternative PSI disclose the percentage of a test group that re-offend, but they cannot predict whether an individual will re-offend. Contrary to Donnelly’s argument on appeal, actuarial risk scores may not be used as the sole determinative factor in deciding whether the offender can be supervised safely and effectively in the community. *See State v. Loomis*, 2016 WI 68, ¶98, 371 Wis. 2d 235, 881 N.W.2d 749. While the sentencing court may consider those actuarial risk scores, it must use its own judgment to determine a defendant’s rehabilitative needs and the degree to which he or she represents a risk to the public.

¶22 Donnelly contends the court was improperly influenced by the prosecutor’s “impassioned argument.” Our review of the prosecutor’s argument at sentencing discloses no improper or inflammatory argument.

¶23 Finally, Donnelly contends the court improperly considered his denial of sexual contact because

the largest study of factors that predict risk for sexual offender re-offense found that sexual offenders who denied their offenses were not any more likely to commit additional sexual assaults than those who admitted their

offense histories. This suggests that denial, per se, does not render a sex offender more dangerous.

However, the sentencing court found Donnelly's denial impacted his need for close rehabilitative control. Donnelly cites no case that holds a sentencing court is obligated to explain why it has rejected information that it deems unpersuasive in light of its reasoned finding. The court is not bound to accept Donnelly's argument and could reasonably conclude that Donnelly himself is not amenable to treatment because of his continued denial.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

